

Service Date: May 26, 1994

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER Of MONTANA-DAKOTA	) UTILITY DIVISION
UTILITIES COMPANY, Application	)
for Authority to Establish	) DOCKET NO. 94.4.17
Increased Rates for Natural Gas	)
Service in Montana.	) ORDER NO. 5781a

PROTECTIVE ORDER

On May 20, 1994, in conjunction with objections to data requests, Montana-Dakota Utilities Company (MDU) filed before the Public Service Commission (PSC or Commission) a Motion for Protective Order to govern access to information (requested by data request) that MDU views as confidential trade secret or subject to the right of individual privacy. The PSC grants the Protective Order. With the Order, the PSC is serving a Notice of Commission Action (NCA) on the related objections and, to the extent necessary to protect the integrity of this Order, that NCA is incorporated herein.

MDU seeks protection for requested information regarding employee compensation (highest compensated MDU Resources Group and MDU employees) that is not otherwise public information, a settlement agreement with Rockwell International, and certain projected financials (possibly prohibited by the Security and Exchange Commission from selective disclosure) . In addition, as a result of overruling an objection by MDU pertaining to financial information of subsidiaries of MDU Resources Group, Inc., the PSC also extends MDU's request to that information.

The apparent nature of the information for which protection is sought is such that it could be confidential trade secret, subject to protection from public disclosure pursuant to Section 69-3-105, MCA, or confidential personal information, subject to protection under the individual privacy clause, Art. II, sec. 10, of the Montana Constitution. The PSC hereby orders that the information submitted in accord with the above-referenced NCA on related MDU objections, the subject matter referenced above (whether based on trade secret or individual privacy), or this Order, will be treated as "confidential" under the terms of this Order.

It is further ordered that the following Protective Order provisions shall be in effect (as a convenience only, unless the context clearly dictates otherwise, reference to “trade secret” and “confidential information” shall include information protected on the basis of individual privacy):

1. (a) Confidential Information. All documents, data, information, studies and other materials furnished pursuant to any interrogatories or requests for information, subpoenas, depositions, or other modes of discovery, or pursuant to Commission order, that are claimed to be of a trade secret, privileged or confidential nature shall be furnished pursuant to the terms of this Order, and shall be treated by all persons accorded access thereto pursuant to this Order as constituting trade secret, confidential or privileged commercial and financial information (hereinafter referred to as “Confidential Information”) , and shall neither be used nor disclosed except for the purpose of this proceeding, and solely in accordance with this Order. All material claimed to be Confidential Information shall be so marked by the party or affiliate by stamping the same with a designation indicating its trade secret, proprietary or confidential nature.
- (b) Use of Confidential Information and Persons Entitled to Review. All Confidential Information made available pursuant to this Order shall be given solely to counsel for the parties, and shall not be used or disclosed except for purposes of this proceeding; provided, however, that access to any specific Confidential Information may be authorized by said counsel, solely for the purpose of this proceeding, to those persons indicated by the parties as being their experts in this matter. Any such expert may not be an officer, director or employee (except legal counsel) of the parties, or an officer, director, employee or stockholder or member of an association or corporation of which any party is a member, subsidiary or affiliate. Any member of the Public Service Commission, and any member of its staff, the Consumer Counsel, and any member of his staff may have access to any Confidential Information made available pursuant to this Order, and shall be bound by the terms of this Order.
- (c) Nondisclosure Agreement. Prior to giving access to Confidential Information as contemplated in paragraph 1(b) above to any expert, counsel for the party seeking review of the Confidential Information shall deliver a copy of this Order to such person, and prior to disclosure such person shall agree in writing to comply with and be bound by this

Order. In connection therewith, Confidential Information shall not be disclosed to any person who has not signed a nondisclosure agreement in the form which is attached hereto and incorporated herein as Exhibit ‘A.’ Court reporters shall also sign an Exhibit ‘A.’ The nondisclosure agreement (Exhibit ‘A’) shall require the person to whom disclosure is to be made to read a copy of this Protective Order and to certify in writing that they have reviewed the same and have consented to be bound by its terms. The agreement shall contain the signatory’s full name, permanent address and employer, and the name of the party with whom the signatory is associated. Such agreement shall be delivered to counsel for the providing party and the Commission.

(d) Delivery of Documentation. Where feasible, Confidential Information will be marked as such and delivered to counsel. In the alternative, the Confidential Information may be made available for inspection and be reviewed by counsel and experts as defined in paragraph 1 (a-c) herein in a place and a time mutually agreed on by the parties, or as directed by the Public Service Commission.

2. Challenge to Confidentiality.

- (a) This Order establishes a procedure for the expeditious handling of information that a party claims is confidential; it shall not be construed as an agreement or ruling on the confidentiality of any such document.
- (b) In the event that the parties hereto are unable to agree that certain documents, data, information, studies or other matters constitute trade secret, confidential or privileged commercial and financial information, the party objecting to the trade secret claim shall forthwith submit the said matters to the Commission for its review pursuant to this Order. When the Commission rules on the question of whether any documents, data, information, studies or other matters submitted to them for review and determination are Confidential Information, the Commission will enter an order resolving the issue.
- (c) Any party at any time upon ten (10) days prior notice may seek by appropriate pleading to have documents that have been designated as Confidential Information or which were accepted into the sealed record in accordance with this Order removed from the

protective requirements of this Order or from the sealed record and placed in the public record. If the confidential or proprietary nature of this information is challenged, resolution of the issue shall be made by a hearing examiner and/or the Commission after proceedings in camera, which shall be conducted under circumstances such that only those persons duly authorized hereunder to have access to such confidential matter shall be present. The record of such in camera hearings shall be marked "CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. 94.4.17." It shall be transcribed only upon agreement by the parties or Order of the Hearing Examiner or the Commission, and in that event shall be separately bound, segregated, sealed, and withheld from inspection by any person not bound by the terms of this Order, unless and until released from the restrictions of this Order either through agreement of the parties, or after notice to the parties and hearing, pursuant to an Order of the Hearing Examiner or the Commission. In the event that the Hearing Examiner or the Commission should rule in response to such a pleading that any information should be removed from the protective requirements of this Order or from the protection of the sealed record, the parties, at the request of the providing party and to enable the providing party to seek a stay or other relief, shall not disclose such information or use it in the public record for five (5) business days.

3. Seal. While in the custody of the Commission, materials subject to this Order shall be marked CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. 94.4 . 17," and due to their trade secret nature they shall not be considered as records in the possession or retained by the Commission within the meaning of the open meetings or public records statutes.

4. Use in Pleadings, Briefs, etc. Where reference to Confidential Information in the sealed record is required in pleadings, briefs, argument or motions, it shall be by citation of title or exhibit number or by

some other nonconfidential description. Any further use of or substantive references to Confidential Information shall be placed in a separate section of the pleading or brief and submitted to the Commission under seal. This sealed section shall be served only on counsel of record (one copy each) , who have signed an Exhibit "A." All the protections afforded in this

Order apply to materials prepared and distributed under this paragraph.

5. (a) Use in Decisions and Orders. The Hearing Examiner or the Commission will attempt to refer to Confidential Information in only a general or summary form and will avoid reproduction in any decision of Confidential Information to the greatest possible extent. If it is necessary for a determination in this proceeding to discuss Confidential Information other than in a general or summary form, it shall be placed in a separate section of the Order or Decision under seal. This sealed section shall be served only on counsel of record (one copy each) who have signed an Exhibit "A." Counsel for other parties shall receive the cover sheet to the sealed portion and may review the sealed portion on file with the Commission once they have signed an Exhibit "A."
- (b) Summary for Record. If deemed necessary by the Commission, the providing party shall prepare a written summary of the Confidential Information referred to in the Decision or Order to be placed on the public record.
6. Segregation of Files. All Confidential Information filed with the Commission will be sealed by the Commission, segregated in the files of the Commission, and withheld from inspection by any person not bound by the terms of this Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties or, after notice to the parties and hearing, pursuant to the Order of the Commission and/or final order of a Court having jurisdiction. All written Confidential Information coming into the possession of the Consumer Counsel under this order may be retained by him in his office files, but shall be withheld from inspection by others, except for his staff and his counsel, unless released by the Public Service Commission and/or a final order of a court under this paragraph 6 and subject always to the terms of paragraph 7 of this Order.
7. Preservation of Confidentiality. All persons who may be entitled to receive, or who are afforded access to any Confidential Information by reason of this Order shall neither use nor disclose the Confidential Information for purposes of business or competition, or any other purpose other than the purposes of preparation for and conduct of this proceeding, and then solely as contemplated herein, and shall take reasonable precautions to keep the Confidential Information secure and in accordance with the purposes and intent of this Order.

8. Reservation of Rights. The parties hereto affected by the terms of this Protective Order further retain the right to question, challenge, and object to the admissibility of any and all data, information, studies and other matters furnished under the terms of this Protective Order in response to interrogatories, requests for information or cross-examination on the grounds of relevancy or materiality.

This Order shall in no way constitute any waiver of the rights of any party herein to contest any assertion or finding of trade secret, confidentiality or privilege, and to appeal any such determination of the Commission or such assertion by a party.

DONE AND DATED this 24th day of May, 1994 by a vote of 4-1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

---

BOB ANDERSON, Chairman

---

BOBOWE, Vice Chairman  
(voting to dissent, dissent attached)

---

DAVE FISHER, Commissioner

---

N ANCY MCCAFFRE , Commissioner

---

DANNY OBE RG, Commissioner

ATTEST:  
Kathlene M. Anderson  
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. 38.2.4806, ARM.

### **DISSENT OF COMMISSIONER ROWE**

I dissent from the Commission's decision to issue a Protective Order covering the compensation received by the top ten employees of MDU Resource Group (PSC-28) and the top ten employees of MDU (PSC-29)

Protective orders are granted under the Commission's statutes and rules for business "trade secrets." Trade secrets are defined in Section 30-14-402, MCA, as information which "derives independent economic value" from not being generally known. The Commission's statutes extend protection to trade secrets. Section 69-3-105(2), MCA. There is no room for serious argument that information about management compensation is somehow a trade secret. It is not.

As utility enterprises become more competitive, the scope of material for which protection is sought broadens. Unfortunately, timely and efficient processing of contested cases often requires granting general protective orders up front, placing the burden on concerned parties to request of the Commission that particular information be made public.

Broad protective orders have two harmful consequences. First, they impinge on the public's legitimate right to know. Second, they make it more difficult for the Commission and other parties to handle material efficiently.

The decision to grant proprietary status to management compensation in this case follows closely upon the Commission's decision to issue a protective order covering compensation received by telephone company managers and filed with the Commission as part of annual reports (Docket No. N-93-105, Order No. 5777).<sup>1</sup> That decision, reached after briefing and extensive consideration, was even more disturbing. Together, these two actions open wide the door to even greater abuses of Commission protective orders.

In other areas, the Commission is doing laudable work to improve its notice, open meetings and public participation procedures. However, concerning the misuse of protective orders the Commission is failing its responsibilities under the Montana Constitution to ensure public participation and to protect the public right to know (Article II, Sections 8 and 9). The Commission should review its general policy on protective orders, and consider efficient and effective ways to shift the burden to the party requesting protection to prove that in fact trade

---

<sup>1</sup> My written dissent in that case addressed the privacy issue raised by the telephone companies on behalf of their managers. would apply the same analysis in this instance.



secrets are involved.

RESPECTFULLY SUBMITTED this 24th day of May, 1994.

---

BOB ROWE, Vice Chairman